



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-I-S, INC.

DATE: APR. 26, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT staffing and consulting service, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage of the Beneficiary in this case, as well as the proffered wages of all its other beneficiaries of Form I-140, Immigrant Petition for Alien Worker, petitions (I-140 beneficiaries) from the priority date of the this petition onward.

On appeal, the Petitioner submits additional evidence and asserts that it has established its ability to pay.

Upon *de novo* review, we will withdraw the Director's decision and remand the case to the Director for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving a labor certification, DOL certifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position and that a foreign national's employment in the position will not hurt the wages and working conditions of U.S. workers in similar jobs. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration

¹ In cases like this one, a labor certification's filing date becomes a petition's "priority date." By that date, a beneficiary must meet all the job requirements of an offered position stated on a labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977).

Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 20, 2015.

The Director found that the Petitioner had not demonstrated its ability to pay the proffered wage to this Beneficiary and to all its other I-140 beneficiaries, who had pending or approved petitions as of the priority date of this petition. The Director acknowledged that the Petitioner had paid wages to the Beneficiary and to many other sponsored I-140 beneficiaries in 2015, but found that the total wages paid were less than the total proffered wages for all the I-140 beneficiaries. Because the Petitioner had not submitted its tax returns, annual report, audited financial statement, or other evidence of its ability to pay the difference between the wages paid and the proffered wages for 2015, the Director concluded that the record did not establish the Petitioner's ability to pay.

On appeal, the Petitioner submits additional evidence including its federal income tax return (Form 1120S) for 2015, the Beneficiary's monthly pay statement for April 2016, and additional wage-related documentation about the Petitioner's other I-140 beneficiaries. Based upon the entire record, we find that the Petitioner has established, by a preponderance of the evidence, its continuing ability to pay the proffered wage from the priority date of April 20, 2015, onward. Accordingly, we will withdraw the Director's decision. However, for the reason discussed below, the record does not establish that the petition is approvable.

B. Beneficiary Qualifications

In addition to establishing its ability to pay the proffered wage, the Petitioner must establish that the Beneficiary met all of the education, training, and experience requirements on labor certification, as of the petition's priority date. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. at 158.

In reviewing the record we find the evidence unclear as to whether the Beneficiary has the requisite work experience to qualify for the job of software engineer under the terms of the labor certification. The labor certification requires six months of experience as a software engineer or in a related occupation (section H.6, H.6-A, H.10, H.10-A, and H.10-B of the labor certification). The labor certification also states that the Beneficiary did not gain any qualifying experience with the Petitioner in a position substantially comparable to the job opportunity in this petition (section J.21 of the labor certification). Therefore, the first job listed in section K of the labor certification regarding the Beneficiary's work experience – as a Jr. SQL Developer with the Petitioner from February 11, 2013, up to the present – may not represent qualifying experience for this petition. The other job experience listed on the labor certification was with [REDACTED] in [REDACTED] New York, from January 20, 2012, to August 24, 2012. It would appear that this experience – asserted as a software engineer – was gained as part of the Beneficiary's master's degree program in electrical engineering at [REDACTED] since his academic transcript states that he received credit for an electrical engineering internship during the spring and summer semesters of 2012 en route to a Master of Science in Electrical Engineering, which was conferred on December 15, 2012. However, no letter has been submitted from [REDACTED] confirming the Beneficiary's work experience with that company. Therefore, we are remanding the case to the Director for further consideration of this issue.

III. CONCLUSION

The record establishes the Petitioner's ability to pay the proffered wage from the priority date onward. However, the Petitioner has not demonstrated that the Beneficiary has the requisite work experience to qualify for the job opportunity under the terms of the labor certification. On remand, the Director shall provide the Petitioner the opportunity to submit additional evidence on this issue, and any other issue(s) the Director may deem pertinent.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-I-S-, Inc.*, ID# 228603 (AAO Apr. 26, 2017)